(1)

Supreme Court
FILED

No. 05 208 JUL 15 2005

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In The

Supreme Court of the United States

DAVID CALLISON,

Petitioner,

v.

CITY OF PHILADELPHIA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

The lower court in this matter allowed the respondent/ employer to enforce a policy that required the petitioner/ employee to stay at home while he was on approved FMLA leave, despite the fact that there was no logical reason to restrict him to stay at home. In doing so, the lower court granted the respondent, and all future public and private employers, the right to control employees while they are on lawful FMLA leave despite the fact that they have met all the requirements of the FMLA itself.

QUESTIONS PRESENTED

1. Did the lower court err in finding that the respondent's sick leave policy, which was enforced upon the petitioner while he was at home and on approved FMLA leave, did not interfere with his substantive FMLA rights?

3. Did the lower court err in finding that the petitioner had to adhere to respondent's sick leave policy requirements while he was on FMLA leave despite the fact that he had already been approved for FMLA leave and met the requirements of the FMLA itself?

TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	i
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	
I. THIS HONORABLE COURT SHOULD ENSURE THAT THE PRECEDENT SET BY THE THIRD CIRCUIT IS APPROPRIATE, BECAUSE IT PERMITS EMPLOYERS-- BOTH PRIVATE AND PUBLIC-- TO CONTROL THE WHEREABOUTS OF EMPLOYEES WHO ARE OUT ON APPROVED FMLA LEAVE	4
II. THE CITY'S POLICY IMPROPERLY INVOKES ADDITIONAL REQUIREMENTS UPON EMPLOYEES WHO TAKE FMLA LEAVE	7
CONCLUSION	8

TABLE OF AUTHORITIES

Page

Callison v. City of Philadelphia, 128 Fed. Appx. 897 (3d Cir. 2005) 1

Pendarvis v. Xerox Corp., 3 F.Supp.2d 53, 56 (D.D.C. 1998) 5

STATUTES

29 CFR 825.220(a)(2) 1, 5

Section 105(a)(1) of the FMLA 1, 5

29 CFR 825.220(b) 1, 5

29 U.S.C. Section 2613(a) 5

29 U.S.C. Section 2613(d)(1) 6

29 U.S.C. Section 2613(e) 6

Section 104(a)(1)(B) of the FMLA 7

Section 102(a)(1)(d) of the FMLA 1, 7

OPINION BELOW

The Third Circuit of Appeals Jurisdiction selected this matter for publication in the Federal Reporter. The decision, which was deemed "precedential" by the Third Circuit, and is reported at 128 Fed. Appx. 897 (3d Cir. 2005).

JURISDICTION

The Third Circuit filed its decision on April 5, 2005, and entered an order affirming entry of summary judgment in favor of respondent, which was granted by the lower court on May 8, 2004. This Court has jurisdiction under 28 U.S.C. Section 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Section 105 of the FMLA and 29 C.F.R. 825.220

The FMLA makes it unlawful for an employer, such as Appellee to "interfere with, restrain, or deny" an employee's right to take 12 weeks of FMLA leave. Section 105(a)(1) of the FMLA; and 29 CFR 825.220(a)(2). The FMLA further states that: "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. 29 CFR 825.220(b). Moreover, ". . . an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." Section 102(a)(1)(d) of the FMLA.

STATEMENT OF THE CASE

The petitioner, David Callison, first became employed with the respondent, City of Philadelphia, on February 2, 1998 as a Heavy Duty Vehicle Maintenance Technician with the Office Fleet Management.

In about January 2000, Mr. Callison was diagnosed with deep anxiety reaction and stress, due to stress at both work and home, by his physician, Dr. Jay Moore. As a result, he took intermittent sick leave during that year amounting to no more than 26 days throughout the year 2000.

On January 24, 2001, Mr. Callison went on approved FMLA leave. Prior to January 24, 2001, Mr. Callison was not notified that he had any disciplinary problems with the exception of being placed on a sick abuse list in October 2000. In fact, in 1998, he was commended for having perfect attendance.

Around January 2001, Mr. Callison's union representative told him that "perhaps given . . . how sick he was and that he was on medication maybe he shouldn't be [at work]." It was at that time that Mr. Callison requested FMLA leave. The City's agents were aware that Mr. Callison was sick at that time.

Between January 24, 2001 and April 17, 2001, Mr. Callison was out on approved FMLA leave for anxiety reaction.

The City has a Sick Leave Policy which reads as follows: "During regular working hours, when an employee is home on sick leave, the employee must notify the appropriate authority or designee when leaving home and upon return. An employee is to remain at home except for personal needs related to the reason for being on sick leave. While on sick leave an employee may be called or visited by a sick leave

investigator unless the employee has 150 days or more of accumulated sick leave credit."

Based upon The City's Penalties provision regarding the said Sick Leave Policy, if a given employee were to violate the Sick Leave Policy more than once, he or she would be subjected to discipline including suspension and termination.

On the very day that he commenced his FMLA leave, January 24, 2001, The City purports to have issued an Employee Warning Record to Mr. Callison, which would have been his first recorded violation of the said Sick Leave Policy, although Mr. Callison was not at work to receive, and did not receive, this memorandum. The said Employee Warning Record purports that Mr. Callison was not at home on January 8, 2001, while he was out sick, and he thus violated the Sick Leave Policy, because he failed to notify the Sick Control Hotline that he was leaving his residence on that date.

The City's agent called Mr. Callison at home on January 29, 2001 and February 7, 2001 for no good reason other than to enforce its Sick Leave Policy.

On May 4, 2001, after Mr. Callison was back from FMLA leave, he first received 2 Notices of Suspension for a total of 4 days for allegedly leaving his residence for a second and third time on January 29, 2001 and February 7, 2001 without notifying the Sick Control Hotline, while he was on approved FMLA leave. The recommendations for these suspensions were dated February 1 and 9, 2001, which was during Mr. Callison's approved FMLA leave. On May 8, 15, 16 and 17, 2001, Mr. Callison served his suspensions without pay.

Mr. Callison filed a complaint alleging violations of the FMLA in the Eastern District of Pennsylvania on May 8, 2003. The City filed a motion for summary judgment on January 20, 2004 of all counts. Appellant filed a motion for partial summary judgment on February 17, 2004. Appellant's motion

for partial summary judgment was limited to the issues presented in this petition.

On May 5, 2004, the Honorable Legrome D. Davis denied Mr. Callison's motion for partial summary judgment and granted summary judgment in favor of the City on all issues. Mr. Callison filed a motion for reconsideration pursuant to FRCP Rule 59(e) on April 7, 2004. After an oral argument on May 24, 2004, on June 17, 2004, the Honorable Legrome D. Davis denied Mr. Callison's motion for reconsideration.

Mr. Callison filed the Notice of Appeal to the Third Circuit Court of Appeals in this matter on July 8, 2004 restricted to the same issues presented in this petition. The Third Circuit affirmed Judge Davis' ruling on April 5, 2005.

REASONS FOR GRANTING THE PETITION

I. THIS HONORABLE COURT SHOULD ENSURE THAT THE PRECEDENT SET BY THE THIRD CIRCUIT IS APPROPRIATE, BECAUSE IT PERMITS EMPLOYERS-- BOTH PRIVATE AND PUBLIC-- TO CONTROL THE WHEREABOUTS OF EMPLOYEES WHO ARE OUT ON APPROVED FMLA LEAVE.

The precedent set by the Third Circuit will result in widespread national consequences. Now employers, both private and public, have the justification to implement policies to control employees while they are out on FMLA leave. The employees who must adhere to these policies can be disciplined for violations of the policies even though they are at home on approved FMLA leave-- and not at the workplace.

Since Section 105(a)(1) of the FMLA and 29 CFR 825.220(a)(2) make it unlawful for an employers, such as the City to "interfere with, restrain, or deny" an employee's right to take 12 weeks of FMLA leave, this Interference claims, as they are called, are based on the prescriptive sections of the FMLA which create substantive rights for eligible employees. The basic substantive right granted to all employees under the FMLA is the right to take FMLA leave.

The FMLA further states that: "'Interfering with' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 CFR 825.220(b).

The Third Circuit concluded that since Mr. Callison was allowed to take his FMLA leave and return to work after his leave, the enforcement of the City's Sick Leave Policy did not interfere with Mr. Callison's substantive rights. However, the Third Circuit failed to address whether or not the City's actions of suspending Mr. Callison would served to discourage Mr. Callison and other employees of the City from taking FMLA leave in the future.

An employer can discourage employees from taking FMLA in much less extreme ways than an absolute refusal to allow a worker to return from FMLA leave. In the matter at bar, the City's act of enforcing its Sick Leave Policy on the Mr. Callison while he was on approved FMLA leave, did nothing more than to harass the Mr. Callison while he was on leave and thus discourage him and other employees from taking FMLA because of the fear of suspension without pay or termination for unfair reasons.

The court below concluded that the City's Sick Leave policy ensures that employees do not abuse their FMLA rights. However, the FMLA has its own anti-abuse provisions. See 29 U.S.C. Section 2613(a); and Pendarvis v. Xerox Corp., 3 F.Supp.2d 53. 56 (D.D.C. 1998) in which the court stated

Section 2613 "is designed as a check against employee abuse of leave." Moreover, the enforcement of the City's Sick Leave Policy is based upon the false presumption that an employee has abused his/her FMLA leave if he/she is not home. In fact, nothing can be further from the truth. In the matter at bar, there was no logical reason to demand that Mr. Callison stay inside his home at all times while on FMLA leave. He was not purporting to be physically unable to do anything. He was purporting to have emotional problems which necessitated a rest period from the stresses of his work environment.

Once an employee is pre-approved for FMLA leave, he/she should be left alone. The FMLA allows an employer to obtain a second opinion from a health care provider of its choosing, and updated certifications on a reasonable basis. 29 U.S.C. Section 2613(d)(1) and (e). The City failed to follow the procedures of the FMLA designed to ensure Mr. Callison was not abusing his FMLA rights and instead suspended Mr. Callison for an irrelevant reason-- because he was not at home when The City called him.

It is the position of Mr. Callison that even though he was permitted to return from his pre-approved leave, his FMLA rights were still interfered with, because he was issued 2 suspensions (totaling 4 days without pay) for no good reason which will serve to discourage him and other employees from taking FMLA leave.

Lastly, the opportunity for abuse is much too great. The City can suspend and terminate its employees, including Mr. Callison, by over-scrutinizing their adherence or lack of adherence to the policy without fear of violating the FMLA itself. Even if the City were to mistakenly believe that Mr. Callison violated the sick leave policy, their actions would be justified, because they did not violate the FMLA.

Although Mr. Callison was not terminated, the City's Sick Leave Policy would have allowed The City to terminate

Mr. Callison's employment if he was purported to have violated the Sick Leave Policy a total of 5 times. In such an instance, Mr. Callison would not have returned from FMLA leave. Therefore, it defies logical reasoning to conclude that the suspensions issued to Mr. Callison did not interfere with his right to FMLA leave, given that termination would have interfered with his leave.

Mr. Callison was not returned to the same pay that he had prior to his FMLA leave, because he was suspended without pay for 4 days. In the absence of the suspensions, Mr. Callison would not have lost 4 additional days of pay. The FMLA guarantees that any person taking FMLA leave be restored with the same pay after returning from FMLA leave. See Section 104(a)(1)(B) of the FMLA.

II. THE CITY'S POLICY IMPROPERLY INVOKES ADDITIONAL REQUIREMENTS UPON EMPLOYEES WHO TAKE FMLA LEAVE

To be entitled to take FMLA leave, employees are not required to stay at home or report to their employer when they have to leave home.

In the case of Mr. Callison in the matter at bar, the requirements for his "entitlement" to leave is as follows: ". . . an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." Section 102(a)(1)(d) of the FMLA.

The City requires the following of all employees on FMLA leave: "During regular working hours, when an employee is home on sick leave, the employee must notify the appropriate authority or designee when leaving home and upon return . . . [and] An employee is to remain at home except for

personal needs related to the reason for being on sick leave." However, such requirements are too restrictive of persons on FMLA leave, because the FMLA deems the employee eligible for FMLA based upon Section 102(a)(1)(d). It follows that once Mr. Callison qualified for his FMLA leave pursuant to the guidelines of the FMLA, he did not have to fulfill any additional requirements. No provision in the FMLA permits the City to enforce any other requirements upon FMLA candidates beyond those set forth by the FMLA itself.

CONCLUSION

This Honorable Court should grant the petition for writ of certiorari and reverse the decision of the Third Circuit Court of Appeals.

Respectfully Submitted

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Published Opinion
128 Fed. Appx. 897; 2005 U.S. App. LEXIS 6770; 151 Lab. Cas. (CCH) P34,988; 10 Wage & Hour Cas. 2d (BNA) 993

United States Court of Appeals for the Third Circuit

David Callison, Plaintiff-Appellant,	>	
vs.	>	No. 04-2491
City of Philadelphia, Defendant-Appellee	>	

Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil No. 03-cv-03008). District Judge: Hon. Legrome D. Davis.
Filed Apri 19, 2005

BEFORE: BARRY, AMBRO and COWEN, Circuit Judges.

Affirmed by published opinion. Opinion by COWEN, Circuit Judge.

David Callison appeals the District Court's order granting the City of Philadelphia's motion for summary judgment and denying Callison's motion for partial summary judgment. Callison limits his appeal to the portion of the order relating to his interference claim, and waives his retaliation claim. (Appellant's Br. at 6.) He asserts that the District Court failed to recognize that the enforcement of the City's sick leave policies against him while he was on leave pursuant to the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* ("FMLA") [**2] interfered with his substantive FMLA

rights. We have jurisdiction [*898] pursuant to 28 U.S.C. § 1291 and will affirm.

The facts germane to this appeal are undisputed. Callison was initially employed by the City's Office of Fleet Management ("OFM") as a Heavy Duty Maintenance Technician on February 2, 1998. Callison had perfect attendance in his first year of employment; however, this record deteriorated. In about January 2000, Callison was diagnosed with deep anxiety reaction and stress, caused by stress at home and at work. That year Callison used twenty-six, and the following year used twelve, days of sick leave. Because of the significant amount of absences, the City placed Callison on a Sick Abuse List on October 30, 2000. Employees on this list are required to obtain medical certification for all sick days and are subject to progressive penalties for violations of the sick leave policies.

The OFM employee manual contains the following requirement for all employees on sick leave:

> During regular working hours, when an employee is home on sick leave, the employee must notify the appropriate authority or designee when leaving home and upon return[**3] . An employee is to remain at home except for personal needs related to the reason for being on sick leave. While on sick leave an employee may be called or visited by a sick leave investigator unless the employee has 150 days or more of accumulated sick leave credit.

(App. at 109.)
On January 8, 2001, while still on the Sick Abuse List,

Callison took another sick day. Callison never notified the Sick Control Hotline that he was leaving his home, and when an investigator telephoned his residence he was not there. Pursuant to the OFM's policy he was given a warning for this violation.

Following this violation, Callison was out on approved FMLA leave for approximately three months, from January 24 to April 17, 2001. On January 29 and February 7, 2001, the City conducted additional investigations and found that Callison was not home on those dates and had failed to notify the hotline. In accordance with the progressive penalties policy, Callison received a one and three day suspension, respectively, for his failures to notify the hotline that he was leaving his home. These suspensions were served by Callison, on May 8, 15, 16 and 17, 2001, after he returned to work from his FMLA[**4] leave.

We exercise plenary review over a District Court's order granting summary judgment. *See* Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 679 (3d Cir. 2003). Summary judgment is appropriate if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. *See*Fed. R. Civ. P. 56(c). In evaluating the evidence, we "take the facts in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in [its] favor." *Doe v. County of Centre*, 242 F.3d 437, 446 (3d Cir. 2001).

The primary purposes of the FMLA are to "balance the demands of the workplace with the needs of families" and "to entitle employees to take reasonable leave for medical reasons." 29 U.S.C. § 2601(b)(1) and (2). The FMLA endeavors to accomplish these purposes "in a manner that

accommodates the legitimate interests of employers." 29 U.S.C § 2601(b)(3).

The FMLA contains two relatively distinct types of provisions. First, it creates a series of prescriptive substantive rights for eligible employees, often referred to[**5] as the "entitlement" or "interference" provisions which set floors for employer conduct. *See* *Churchill v. Star Enters.*, 183 F.3d 184, 192[*899] (3d Cir. 1999). Eligible employees "shall be entitled to a total of twelve workweeks of leave during any twelve-month period" if the employee has a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). Following a qualified absence, the employee is entitled to be reinstated to the former position or an alternate one with equivalent pay, benefits and working conditions. 29 U.S.C. § 2614(a)(1).
Additionally, the FMLA provides protection against discrimination based on the exercise of these rights, often referred to as the "discrimination" or "retaliation" provisions. *See* 29 U.S.C. § 2615(a)(1) and (2); 29 C.F.R. § 825.220(c) ("An employer is prohibited from discriminating against employees . . . who have used FMLA leave."). Employers may not "use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions[**6] or disciplinary actions." 29 C.F.R. § 825.220(c)

This appeal only involves the interference provision of the FMLA. In order to assert a claim of deprivation of entitlements, the employee only needs to show that he was entitled to benefits under the FMLA and that he was denied them. 29 U.S.C. §§ 2612(a), 2614(a). The Act provides that "it shall be unlawful for any employer to interfere with,

restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1). Under this theory, the employee need not show that he was treated differently than others. Further, the employer cannot justify its actions by establishing a legitimate business purpose for its decision. An interference action is not about discrimination, it is only about whether the employer provided the employee with the entitlements guaranteed by the FMLA. It is undisputed that Callison was entitled to the benefits of the FMLA. Accordingly, the only issue we must determine is whether the City denied Callison of his entitlements under the FMLA by enforcing its own sick leave policies against him[**7] while he was on leave.

Callison argues that the FMLA anti-abuse and eligibility provisions conflict with the City's call-in requirement in its sick leave policy and therefore the requirement should not have applied to him while he was on leave. He asserts that "once an employee is pre-approved for FMLA leave, he/she should be left alone." (Appellant's Br. at 8.) Recognizing that he was permitted to return to work after his leave, Callison argues that his rights were interfered with because he was issued two suspensions while on leave for leaving his home without notifying the City. He reasons that he was not restored with the same salary because these suspensions amounted to four days of lost wages.

In granting the City's motion for summary judgment, the District Court found that the City's sick leave policy requiring an employee on leave to "call the Sick Leave Hotline when leaving home during regular working hours does not conflict with any substantive provisions of the FMLA." (App. at 8.) Further, the Court reasoned that the purpose of the FMLA is not compromised by this policy because it "neither prevents employees from taking FMLA

leave nor discourages employees from taking[**8] such leave. It simply ensures that employees do not abuse their FMLA leave." We agree.

The FMLA is meant to prohibit employers from retaliating against employees who exercise their rights, refusing to authorize leave, manipulating positions to avoid application of the Act, or discriminatorily applying policies to discourage employees [*900] from taking leave. 29 C.F.R. § 825.220. In the instant case, the City did not engage in any of these prohibited acts. The City provided Callison with the entitlements set forth in the FMLA (e.g., a twelve-week leave and reinstatement after taking medical leave).

Callison's contention that the FMLA's anti-abuse provisions contained in 29 U.S.C. § 2613 preempt the City's procedures is meritless. n1 The anti-abuse provisions in the FMLA permitting employers to request second opinions and certifications does not conflict with the City's provision requiring employees on medical leave to call-in when leaving their home during business hours. These "certification" provisions merely outline some of the employer's rights and employee's corresponding obligations. It neither establishes an employee's entitlements[**9] nor provides an exhaustive list of an employer's rights

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 We will not consider whether this argument was waived because it was not raised in Callison's response to the City's motion for summary judgment. Rather, we will deny this claim on the merits.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Similarly, the eligibility requirements contained in 29 U.S.C. § 2612(a)(1) do not conflict with the call-in procedure. Unlike the eligibility provision, the call-in procedure does not serve as a pre-requisite to entitlement of FMLA leave. Rather, the procedure merely sets forth obligations of employees who are on leave, regardless of whether the leave is pursuant to the FMLA. The purpose of the procedure is to provide an additional safeguard against sick leave abuse by employees.

Finally, contrary to Callison's assertion, there is no right in the FMLA to be "left alone." (Appellant's Br. at 8.) Nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave, particularly those who[**10] enter leave while on the employer's Sick Abuse List.

We recognize that where an employer's internal policies conflict with the FMLA, the FMLA controls and the employee need only comply with the requirements of the Act to invoke its protection. The FMLA provides that "the rights established for employees under this Act . . . shall not be diminished by any collective bargaining agreement, or any employment benefit program or plan." 29 U.S.C. § 2652(b); *see also* *Vanderpool v. INCO Alloys Int'l, Inc.*, 1999 U.S. Dist. LEXIS 12363 (S.D.W.V. June 3, 1999) (denying summary judgment because the employer's requirement of advance notice and prohibition of telephonic requests directly conflicted with FMLA provisions permitting telephonic notice and dispensing with advance notice if the need for leave was unforeseeable); *Marrero v. Camden County Bd. of Soc. Servs.*, 164 F. Supp. 2d 455 (D.N.J. 2001) (finding that the employer's policy requiring certification for five consecutive absences directly conflicts with the FMLA

provision affording employees at least fifteen days to provide a certification).
Internal sick leave policies or any collective[**11] bargaining agreements are only invalidated to the extent they diminish the rights created by the FMLA. "Federal labor law requires employers to adhere to collective bargaining agreements; nothing in the FMLA entitles employees to variance from neutral rules." *See Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 714 (7th Cir. 1997) ("What matters for current purposes is that the FMLA does not tell employers how to send notices [for second opinions]. A firm safely may use the method prescribed by collective bargaining [*901] agreements or some other source of rules.").

Because the City's internal call-in policy neither conflicts with nor diminishes the protections guaranteed by the FMLA, it is not invalidated by the Act. Accordingly, Callison was required to comply with the policy and the City did not abrogate his FMLA rights by placing him on suspension for the violations.

For the foregoing reasons, the judgment of the District Court entered on June 17, 2004, will be affirmed.

(2)

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CITY OF PHILADELPHIA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For the Third Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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United States District Court
for the Eastern District of Pennsylvania

David Callison,	>	
Plaintiff-Appellant,	>	
	>	
vs.	>	No. 03-3008
	>	
City of Philadelphia,	>	
Defendant-Appellee	>	

MEMORANDUM AND ORDER

On May 8, 2003. Plaintiff David Callison ("Plaintiff") brought suit against his employer the City of Philadelphia ("City" or "Defendant") alleging that the City violated the Family Medical Leave Act, 29 U.S.C. § 2601 et seq. ("FMLA" or "Act")), by interfering with the exercise of his rights under the Act and dismissing him in retaliation for his taking FMLA leave. Compl. ¶ 23. On January 20, 2004, the City moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. (Dkt. No. 18). After filing his brief in opposition to the City's Motion, on February 17, 2004, Plaintiff moved for partial summary judgment on his interference claim. (Dkt. No. 20). For the reasons stated

below, Defendant's Motion is GRANTED and Plaintiff's Motion is DENIED.

I. Factual Background

A. Callison's Sick Leave

Plaintiff David Callison was hired by Defendant City of Philadelphia (the "City") on February 2, 1998, as a Heavy Duty Maintenance Technician in the City's Office of Fleet Management (the "OFM"). Am. Compl. ¶ 6. Plaintiff had a commendable attendance record during his first two years with the OFM. In 2000, however, Plaintiff took twenty-six sick days after being diagnosed with deep anxiety reaction and stress. Deposition of David Callison ("D. Callison Dep."), Ex. D-4. As a result, on October 30, 2000, Plaintiff was placed on the "Sick Abuse List" pursuant to the City's Sick Leave Policy. Id., Ex. D-9.

The Sick Leave Policy provides that an employee who is out sick must remain at home during regular working hours and is subject to random checks by a sick leave investigator. City of Philadelphia OFM Employee Manual ("Employee Manual") at 27. If the employee needs to leave his or her home, the employee must notify the Sick Leave Hotline when leaving and upon return. Id. at 27. Plaintiff took a sick day on January 8, 2001, and was not home when the sick leave investigator called him. Deposition of Shelita Winfield ("Winfield Dep.") at 15; D. Callison Dep., Ex. D-4. The following day, Plaintiff called Ms. Winfield and left a message on her voicemail, disputing his placement on the Sick Abuse List. Id. at 16, Ex. Winfield-2; Personnel File of David Callison ("Personnel File") at 12-13.

The OFM's Personnel Assistant, Marion Colby, investigated Plaintiff's claim by reviewing all of Plaintiff's sick notes and comparing them against his attendance record. Deposition of Mary Colby ("Colby Dep.") at 24-25. During the course of her investigation, Ms. Colby noticed that the note signed by a Dr. Kuruvilla, which Plaintiff submitted in connection with his absence of August 3, 2000 (the "August Note"), appeared to be altered. Id. Specifically, the hand-written portion of note had been altered from "off work today 08/02/2000" to "off work today 08/03/2000." Deposition of Christina Derenick, Ex. Denerick-1. Ms. Colby asked her administrative assistant, Sherry Ferraro, to investigate the alteration of the August Note. Colby Dep. at 27. Ms. Ferraro contacted Dr. Kuruvilla, who stated that the August Note was indeed altered, and that neither she nor anyone in her office altered it. Deposition of Sherry Ferraro ("Ferraro Dep.") at 25; Exs. Ferraro 1-2; Colby Dep., Ex. 1.

On January 24, 2001, Plaintiff went on approved FMLA leave.[1] Personnel File at 11. The City informed Plaintiff that while on FMLA leave, he was subject to the rules and regulations of the City's Sick Leave Policy. Id. A sick leave investigator called Plaintiff on January 29, 2001, and February 7, 2001, to ensure his compliance and, on both occasions, Plaintiff was not at home. Callison Dep., Exs. D-5, D-7. On February 21, 2001, the OFM notified Plaintiff that he was in violation of the City's Sick Leave Policy and that his punishment would be held in abeyance until he returned to work. Personnel File at 10.

Upon his return from FMLA leave, Plaintiff

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[1] The City approved Plaintiff's FMLA request on February 13, 2001, making it retroactive to January 23, 2001.

received four days suspension without pay. Colby Dep. at 69-72. Ms. Colby also brought disciplinary charges against him for altering the August Note. Id. Plaintiff testified at his disciplinary hearing that someone in Dr. Kuruvilla's office had altered the August Note, but he was unable to offer any evidence in support of his testimony. Following the hearing, on May 17, 2001, Ms. Colby recommended that Plaintiff receive a thirty day suspension with intent to dismiss pursuant to Civil Service Regulation 21.06, which provides that "falsification of proof to justify such sick leave shall be cause for dismissal." D. Callison Dep., Exs. D-7, D-11. The OFM's Human Resource Manager, Christine Derenick approved Ms. Colby's recommendation. Id., Ex. D-7. Accordingly, the City suspended Plaintiff for thirty days beginning May 22, 2001, and dismissed him on June 21, 2001. Id.

Plaintiff appealed his dismissal to the Civil Service Commission. D. Callison Dep., Ex. D-6. Following a hearing at which Dr. Kuruvilla testified that she did not alter the August Note and Ms. Colby testified that she believed Plaintiff was responsible for the alteration, see id. at 14-16, 18-21, the Civil Service Commission denied Plaintiff's appeal. Civil Serv. Comm'n's Findings and Decision of Dec. 14, 2001 (No. 400S&D).

B. Callison's Medical Insurance

In April 2001, Plaintiff's wife, Michelle Callison, brought the couple's son, Timothy, to the hospital. Deposition of Michelle Callison ("M. Callison Dep.") at 34. The hospital informed Mrs. Callison that their medical insurance had been cancelled. Id. Mrs. Callison called Plaintiff's union, District Council 33, which assured Mrs.

Callison that their benefits would be reinstated. Id. at 36. Shortly thereafter, Mrs. Callison contacted their insurance provider, Keystone Insurance Company ("Keystone"), to confirm the reinstatement of benefits. Id. at 42. Keystone advised Mrs. Callison that their benefits had not been reinstated, however. Id. After calling the union several times to no avail, on May 21, 2001, Mrs. Callison called the Department of Labor ("DOL") about their benefits. Id. at 43. The DOL informed Plaintiff and Mrs. Callison that their medical insurance had been cancelled because of a "clerical" error and that it had been reinstated. Id. at 44.

On the same day, Ms. Derenick received a call from the DOL, which informed her that Plaintiff had filed a FMLA complaint regarding the cancellation of his medical insurance. Deposition of Christine Derenick ("Derenick Dep.") at 40-41. Ms. Denerick informed the DOL that she had spoken with District Council 33 and was under the impression that the issue had been resolved. Id. She also explained that under the Collective Bargaining Agreement between District Council 33 and the City, the City is merely responsible for making monthly premium payments to District Council 33.[2] Id. The City made these payments to District Council 33 on behalf of Plaintiff from January 2001 through June 2001. See Affidavit of Valerie Hayes ("Hayes Aff.") ¶ 8.

On May 22, 2001, Ms. Derenick contacted Plaintiff's

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[2] Plaintiff became a member of District Council 33 on March 3, 1998, and the City stopped administering his health benefits on that date.

union, which informed her that Plaintiff's benefits had been reinstated. Derenick Dep. at 41. She also confirmed that Plaintiff's union would ensure payment of any hospital bills Plaintiff incurred while his medical insurance was cancelled.[3] Id. The following day, Ms. Denerick left a voicemail with the DOL, offering further assistance in the event that Plaintiff's benefits were not reinstated. Id.

III. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505 (1986). In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994). The moving party bears the burden of showing that the record discloses no genuine issues as to any material fact and that he or she is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). Once the moving party has met its burden, the non-moving party must go beyond the pleadings to set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(e); see also Matsushita Elec. Indus. Co. v. Zenith Radio

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[3] Keystone ultimately paid for Timothy Callison's hospital bills. M. Callsion Dep. at 45-47.

Corp., 475 U.S. 574, 585-86, 106 S.Ct. 1348 (1986). There is a genuine issue for trial "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 249. "Such affirmative evidence – regardless of whether it is direct or circumstantial - must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." Williams v. Borough of W. Chester, 891 F.2d 458, 460-61 (3d Cir. 1989).

IV. Analysis

Courts have recognized that the FMLA creates two distinct causes of action. See Peter v. Lincoln Technical Inst., 255 F. Supp. 2d 417, 438 (E.D. Pa. 2002) (citing Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112 (9th Cir. 2001) and Strickland v. Water Works and Sewer Bd. of the City of Birmingham, 239 F.3d 1199 (11th Cir. 2001)). First, it is unlawful under the FMLA for an employer "to interfere with, restrain, or deny" an employee's right to take twelve weeks of FMLA leave. 29 U.S.C. § 2615(a)(1) (2002). Claims pursued under this section are referred to as "interference" claims. See Marrero v. Camden City Bd. of Soc. Servs., 164 F. Supp. 2d 455, 463 (D.N.J. 2001). Second, the FMLA makes it unlawful for an employer to "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [29 U.S.C. § 2615]." 29 U.S.C. § 2615(a)(2) (2002). This portion of the FMLA prohibits an employer from retaliating against an employee who has taken FMLA leave. See Marrero, 164 F.Supp.2d at 463. Plaintiff contends that the City interfered with his ability to take FMLA leave and dismissed him in retaliation for taking FMLA leave. The Court will address Plaintiff's arguments in turn.

A. Callison's Interference Claim

Interference claims are based on the prescriptive sections of the FMLA which create substantive rights for eligible employees. These rights set floors for conduct by employers. See Hodgens v. Gen Dynamics Corp., 144 F.3d 151, 159 (1st Cir. 1998) (citing Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712-13 (7th Cir. 1997)). Interference claims "are not about discrimination." Parker v. Hahnemann Univ. Hosp.U, 234 F.Supp.2d 478, 485 (D.N.J. 2002). "The issue is simply whether the employer provided its employee the entitlements set forth in the FMLA – for example, a twelve-week leave or reinstatement after taking a medical leave." Hodgens, 144 F.3d at 159.[4]

Relying on Marrero v. Camden County Bd. of Soc. Servs., Plaintiff argues that the City's Sick Leave Policy diminished his rights under the FMLA. 164 F.Supp.2d 463-64; see Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Br.") at 13-14. Marrero, however, is distinguishable. The employer in that case had a policy requiring employees to provide a doctor's certificate for any absences in excess of five consecutive days. Id. at

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[4] To state a claim of interference, a plaintiff must demonstrate by a preponderance of the evidence that he or she was entitled to the benefit denied. See, e.g., Strickland v. Water Works and Sewer Bd. of the City, 239 F.3d 1199, 1206-07 (11th Cir. 2001). Looking at the Complaint and his briefs, it is difficult to even ascertain what benefits Plaintiff claims were denied to him by the City. Plaintiff was granted twelve workweeks of leave and upon returning to work, he was restored to his former position.

464. The FMLA, however, requires employers to give employees at least fifteen days to provide medical certification that the condition necessitates extended leave. Id. The court held that the employer's internal policies were invalid because they were in direct conflict with the provisions of the FMLA. Id. at 463-464. In this case, the City's requirement that an employee who is on FMLA Leave must call the Sick Leave Hotline when leaving home during regular working hours does not conflict with any substantive provisions of the FMLA.

Next, Plaintiff argues that the City's subjecting employees on FMLA leave to the rules and regulations of its Sick Leave Policy is inconsistent with the purpose of the FMLA. See Pl.'s Br. at 15-16. The stated purposes of the FMLA are: (1) to balance the demands of the workplace with the needs of families; (2) to entitle employees to take reasonable leave for medical reasons; and (3) to accomplish these purposes in a manner that accommodates the legitimate interests of employers. See 29 U.S.C. § 2601(b)(1)-(3). In the Court's view, these goals are not compromised because the City requires employees on FMLA leave to notify the Sick Leave Hotline when leaving home during regular working hours. Indeed, the requirement neither prevents employees from taking FMLA leave nor discourages employees from taking such leave. It simply ensures that employees do not abuse their FLMA leave.

B. Callison's Retaliation Claim

Retaliation claims are based on the "proscriptive rights" of the FMLA which prevents an employer from discriminating against an employee who has taken FMLA leave. See Hodgens, 144 F.3d at 159-60. To establish a

dismissal was not an unusually harsh punishment. Civil Service Regulation 21.06 mandates the dismissal of an employee who falsifies proof of sick leave. Moreover, there was nothing "suspicious"about the events surrounding prima facie case of retaliation under the FMLA, Plaintiff must show that: (1) he engaged in a statutorily protected activity; (2) he suffered an adverse employment action; and (3) a causal connection exists between the adverse action and Plaintiff's exercise of his FMLA rights.[5] See Campetti v. Career Educ. Corp., No. Civ. A. 02-CV-1349, 2003 WL 21961438, at *14 (E.D.Pa. June 25, 2003) (citing Alfiano v. Merck & Co., Inc., 175 F.Supp.2d 792, 795 (E.D.Pa. 2001)). Assuming for summary judgment purposes only that Plaintiff satisfies the first two elements of his *prime facie* case, the City argues that there is absolutely no evidence to suggest that Plaintiff's dismissal was causally connected to his taking FMLA leave. Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment ("Def.'s Mem.") at 7-10. The Court

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[5] As with other claims of discrimination, retaliation claims are analyzed under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-6, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Accordingly, upon establishing a *prima facie* case, the plaintiff creates a rebuttable presumption that the employer unlawfully discriminated against him or her and the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action. See Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1065-67 (3d Cir. 1996). Once the employer demonstrates that the adverse action was taken for a legitimate, nondiscriminatory reason, the burden shifts to the plaintiff to establish that the employer's proffered reasons were pretextual. Id.

agrees.

Plaintiff was dismissed pursuant to Civil Service Regulation 21.06 for falsifying the August Note. His Plaintiff's dismissal.[6] See Pl.'s Br. at 20-21. Ms. Colby discovered that the August Note had been altered before Plaintiff took FMLA leave, and she recommended that Plaintiff be dismissed prior to his filing a FMLA complaint with the DOL. Although there may be a genuine issue of material fact as to whether Plaintiff actually altered the note, see Derenick Dep. at 55, there is no evidence to link Plaintiff's dismissal to his taking FMLA leave.[7]

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[6] Plaintiff makes much of the fact that the City waited sixteen days to issue a written warning to him for violating its Sick Leave Policy on January 24, 2001; the first day of his FMLA leave. See Pl.'s Br. at 21. Plaintiff, however, fails to mention that as of January 24, 2001, his request for FMLA leave had not yet been approved by the City. Indeed, the City approved his request for FMLA leave on February 13, 2001, and made such leave retroactive to January 24, 2001. See Personnel File at 11.

[7] Nor is there any evidence connecting Plaintiff's suspensions to his taking FMLA leave. Plaintiff was suspended without pay for violating the City's Sick Leave Policy. Significantly, the City held in abeyance his suspensions until he returned from FMLA leave in April 2001. See Campetti, 2003 WL 21961438, at *14 (holding that there was no evidence to connect the plaintiff's discharge to his taking FMLA-approved leave, in part, because the plaintiff's employer did not question him about sexual harassment allegations brought against him by several co-workers until he returned to work).

The Court also rejects Plaintiff's claim that the City "admitted" it violated Plaintiff's proscriptive rights by "canceling [his] health benefits during and after he took approved FMLA leave." See Pl.'s Br. at 22. Plaintiff's argument is based on nothing more than the mischaracterization of Ms. Derenick's testimony. He offers no evidence that the City cancelled his medical coverage or was responsible for administering his benefits. On the other hand, the Callisons' calling District Council 33, Keystone and the DOL, but not the City, upon learning their medical coverage had been cancelled, suggests they were aware that the City played no role its cancellation.

An appropriate order follows.

United States District Court

for the Eastern District of Pennsylvania

David Callison,	>	
Plaintiff-Appellant,	>	
	>	
vs.	>	No. 03-3008
	>	
City of Philadelphia,	>	
Defendant-Appellee	>	

ORDER

ACCORDINGLY, this 30th day of March, 2004, upon consideration of Defendant's Motion for Summary Judgment (Dkt. No. 18), Plaintiff's response thereto, and Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 20), it is hereby ORDERED that:

1. Defendant's Motion for Summary Judgment (Dkt. No. 18) is GRANTED.
2. Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 20) is DENIED.
3. Judgment is entered in favor of Defendant City of Philadelphia and against Plaintiff Daniel Callison.
4. The Clerk is directed to statistically close this matter.

BY THE COURT:

LEGROME D. DAVIS, J.

United States District Court
for the Eastern District of Pennsylvania

David Callison,	>	
Plaintiff-Appellant,	>	
	>	
vs.	>	No. 03-3008
	>	
City of Philadelphia,	>	
Defendant-Appellee	>	

ORDER

AND NOW, this 30th day of March, 2004, it is hereby ORDERED that in accordance with Rule 58 of the Federal Rules of Civil Procedure, judgment be entered in favor of Defendant, City of Philadelphia, and against Plaintiff, David Callison.

It is further ORDERED that the Clerk of Court statistically close this matter.

BY THE COURT,

Legrome D. Davis, J.

United States District Court
for the Eastern District of Pennsylvania

David Callison,	>	
Plaintiff-Appellant,	>	
	>	
vs.	>	No. 03-3008
	>	
City of Philadelphia,	>	
Defendant-Appellee	>	

MEMORANDUM AND ORDER

By Memorandum and Order of March 31, 2004, the Court granted Defendant's Motion for Summary Judgment, finding that it neither interfered with Plaintiff's right to take leave under the Family Medical Leave Act, 29 U.S.C. § 2601 et seq. ("FMLA"), nor discharged him in retaliation for his taking FMLA leave. Callison v. City of Philadelphia, Civ. A. No. 03-3008, 2004 WL 765479 (E.D. Pa. March 31, 2004). Plaintiff has filed a Motion for Reconsideration under Federal Rule of Civil Procedure 59(e) and a Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b).

Courts should grant motions for reconsideration sparingly, reserving them for instances where there has been "(1) an intervening change in controlling law, (2) the emergence of new evidence not previously available,

or (3) the need to correct a clear error of law or to prevent a manifest injustice." General Instrument Corp of Delaware. v. Nu-Tek Elecs. & Mfg., Inc., 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998), aff'd., 197 F.3d 83 (3d Cir. 1999); see also Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171, 106 S.Ct. 2895 (1986) ("The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence."). Mere dissatisfaction with the court's ruling is not a proper basis for reconsideration. See U.S. v. Phillips, Nos. Civ. A. 97-6475, 93-CR-513, 2001 WL 527810, at *1 (E.D.Pa. May 17, 2001) (citing Burger King Corp. v. New England Hood and Duct Cleaning Co., No. 98-3610, 2000 WL 133756, at *2 (E.D.Pa. Feb. 4, 2000).

Much of Plaintiff's argument is addressed to why, in his view, the Defendant's Sick Leave Policy interfered with his right to take twelve weeks of FMLA leave. See Plaintiff's Memorandum in Support of His Motion to Alter or Amend Judgment ("Pl.'s Mem.") 2-6. The Court has already explained why it found this proposition unavailing. The Court determined that the "Sick Leave Policy's requirement that an employee who is on FMLA leave must call the Sick Leave Hotline when leaving home during regular business hours does not conflict with any substantive provisions of the FMLA." Callison, 2004 WL 765479, at *4. Moreover, the Court found that "Plaintiff was granted twelve workweeks of leave and upon returning to work, he was restored to his former position." Id. at n. 4.[1] Plaintiff

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[1] Plaintiff asserts, without support, that "leave" means the right to be left alone and, therefore, his "leave" was "not 'leave' at all" because the City's Sick Leave

merely appears to disagree with these rulings, which alone is not a proper basis for granting his Rule 59(e) Motion.

Federal Rule of Civil Procedure 60(b)(2) permits relief from judgment on the basis of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). See Fed. R. Civ. P. 60(b)(2). To prevail on a Rule 60(b)(2) motion, the movant must show that he exercised due diligence in obtaining the information, that the evidence is material and not merely cumulative, and that the information would have produced a different result if presented before the original judgment. See Compass Tech., Inc. v. Tseng

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Policy subjected him to constant supervision. See Pl.'s Mem. 3-4. "Leave" is not specifically defined in the Act, "so it carries its ordinary dictionary meaning." Babcock v. BellSouth Adver. & Publ'g Corp., 348 F.3d 73, 77 (4th Cir. 2003) (citing Minter v. Beck, 230 F. 3d 663, 666 (4th Cir. 2000)). In the employment context, "'leave' means 'an *authorized* absence or vacation from duty or employment.'" Id. (citing *Webster's Third New Int'l Dictionary* 1287 (1976) (emphasis added)). Under this definition, Plaintiff received FMLA leave.

Plaintiff also argues, for the first time, that the City's Sick Leave Policy conflicts with the FMLA's anti-abuse provisions. See Pl.'s Mem. 6-8. "A motion for reconsideration may not advance new facts, issues, or arguments not previously presented to the court." Vaidya v. Xerox Corp., No. Civ. A. 97-547, 1997 WL 732464, at *2 n.3 (E.D. Pa. Nov. 25, 1997) (citing Smith v.City of Chester, 155 F.R.D. 95, 97 (E.D. Pa. 1994)). Accordingly, the Court declines to consider Plaintiff's newly raised argument.

Labs., Inc., 71 F.3d 1125, 1130 (3d Cir. 1995). The movant under Rule 60(b)(2) "'bears a heavy burden,' which requires 'more than a showing of the potential significance of the new evidence.'" Bohus v. Beloff, 950 F.2d 919, 930 (3d Cir. 1991) (quoting Plisco v. Union R. Co., 379 F.2d 15, 17 (3d Cir.1967), cert. denied, 389 U.S. 1014, 88 S.Ct. 590, 19 L.Ed.2d 660 (1967)). Rule 60(b) motions are viewed as "extraordinary relief which should be granted only where extraordinary justifying circumstances are present." Id. at 930 (quoting Plisco, 379 F.2d at 16; see also Moolenaar v. Gov't of the Virgin Islands, 822 F.2d 1342, 1346 (3d Cir.1987).

To his Motion, Plaintiff has attached a declaration by Deena Bradsher, a former employee of the City of Philadelphia Police Department, who "believe[s] that the City misused the Sick Leave Policy in an effort to terminate [her] employment unfairly while [she] was on protected leave pursuant to the FMLA." See Plaintiff's Motion for Relief From Judgment Pursuant to Rule 60(b), Ex. A ¶ 9. A client of Plaintiff's counsel, Samuel A. Dion, Esq., Ms. Bradsher apparently called Mr. Dion about her January 2004 termination "sometime after" the Court's Memorandum and Order of March 31, 2004. This "newly discovered evidence," however, is not material and would not have produced a different result if presented before the original judgment. Indeed, Ms. Bradsher's termination is wholly irrelevant to Plaintiff's case.

ACCORDINGLY, this 16th day of June, 2004, upon consideration of Plaintiff's Motion for Reconsideration under Federal Rule of Civil Procedure 59(e) (Dkt. No. 24) and a Motion for Relief from Judgment under

Federal Rule of Civil Procedure 60(b) (Dkt. No. 25), and Defendant's response thereto, it is hereby ORDERED that said Motions are **DENIED**.

BY THE COURT:

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LEGROME D. DAVIS, J.